IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 3RD OCTOBER 2007 / 11TH ASWINA 1929

CRL.A.No. 1032 of 2004(B)

CC.15/2000 of ENQUIRY COMMR. & SPL.JUDGE, KOZHIKODE

.....

APPELLANT: ACCUSED

P.KRISHNADAS,
S/O. PERIYASWAMY, KANNANORE, PATTOLA,
MANAPPADAM, PUDUKODE VILLAGE, ALATHUR TALUK,
PALAKKAD DISTRICT.

BY ADV. SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENT: COMPLAINANT

STATE OF KERALA, REPRESENTED BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY P.P.SRI.P.N.SUKUMARAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Crl.M.A.No. 7311/2004 in Crl.A.No. 1032/2004

Dismissed.

3rd October, 2007

Sd/-K. Thankappan,
Judge.

mn.

K. Thankappan, J.

- -

Crl. A. No. 1032 of 2004-B

- -

Dated this the 3rd day of October, 2007

JUDGMENT

Appellant was the accused in C.C. No.15/2000 on the file of the Enquiry Commissioner and Special Judge, Kozhikode. He was charge sheeted for offences punishable under section 7 and 13(1)(d) of the Prevention of Corruption Act, 1988, here-in-after referred to as "the Act", on the allegation that while he was working as Agricultural Assistant, Agricultural Office, Kannambra, he demanded and accepted an amount of Rs.1,500/- from PW1 as illegal gratification. To prove the charge against the appellant, PWs.1 to 10 were examined and Exts.P1 to P22 and Mos.1 to 7 were marked. After closing the prosecution evidence, the appellant was questioned under section 313 Cr.P.C.. He denied the prosecution allegation and stated that he was innocent and the case was foisted against him. He also stated that PW1, at the behest of one Chathunni who was inimical terms with him, put the notes in his pocket from behind. On the side of the defence, the appellant himself was examined as DW1. After considering the evidence, the court below found that the appellant guilty of the offences punishable under sections 7 and 13(1)(d) read with section 13

(2) of the Act and he was convicted thereunder and sentenced to undergo simple imprisonment for one year and to pay a fine of Rs.5,000/- for the offence under section 7 of the Act and in default to undergo simple imprisonment for a further period of three months and sentenced to undergo simple imprisonment for two years and to pay a fine of Rs.10,000/- and in default to undergo simple imprisonment for a further period of six months for the offence under section 13(1)(d) read with section 13(2) of the Act. The court below also directed that the substantive sentence should run concurrently. The benefit under section 428 Cr.P.C. was also allowed. The conviction and sentence awarded against the appellant are assailed in this appeal.

2. This Court heard learned counsel for the appellant Sri.P.Vijayabhanu and learned Public Prosecutor Sri.P.N.Sukumaran.

3. The learned counsel for the appellant challenges the impugned judgment on the following grounds:- Firstly, it is contended that the trial court went wrong in accepting the evidence of PWs.1 and 3 to find the appellant guilty, as there is no evidence to show that on 29-5-1999 PW1 went to the Agricultural Office, Kannambra. Secondly, it is contended that the evidence of PWs.1 2, 3 and 9 are contradictory regarding the alleged demand made by the appellant for illegal gratification and hence the finding

of the trial court that the prosecution has succeeded in proving the demand made by the appellant for illegal gratification is not sustainable. Thirdly, it is contended that the mere recovery of the currency note from the appellant is not enough in the peculiar facts and circumstances of the case to establish the guilt of the appellant. Lastly, it is contended that in the light of the case set up by the appellant in his 313 statement, the evidence of PWs.2 and 9 and Ext.P3 mahazar are not reliable.

4. Before considering the contentions raised for and on behalf of the appellant, it is advantageous to look into the prosecution case against the appellant. An application for financial assistance under the "Janakeeya Asoothrana Padhathi" was filed by one Chinna, mother of PW1, and the said application was allowed and the Krishi Officer, Krishi Bhavan at Kannambra was authorized to disburse the amount after verification. The appellant was in-charge of the Ward in which Chinna constructed the well. First and second instalments were already disbursed and for disbursing the third instalment, the appellant, after obtaining thumb impression of Chinna in certain papers, asked PW1 to come on 29-5-1999 for receiving the cheque. When PW1 came for collecting the cheque, the appellant demanded Rs.1,500/- from PW1 and threatened that if the amount was not paid, the amount already disbursed would be recovered from Chinna.

Thereafter, with the help of his friend Chathunni, PW1 lodged Ext.P1 complaint before the Vigilance Dy.S.P., Palakkad and the Dy.S.P. arranged a trap to book the appellant.

5. PW1 stated that on 25-5-1999 he along with his mother went to the Krishi Bhavan for receiving the cheque and on that day the appellant obtained the thumb impressions of his mother in certain papers and asked them to come on 29-9-1999. He also stated that as directed by the appellant, he went to the Krishi Bhavan on 29-9-1999 and met the appellant, who was present there in his room. He further stated that the appellant gave a cheque for Rs.10,000/- and demanded Rs.1,500/- from him and threatened that if the amount was not paid, the amount already given to Chinna would be recovered as per estimate. According to him, since he was not willing to pay the amount, with the help of PW5 filed the complaint before the Vigilance Dy. S. P. Palakkad. He also stated that a trap was arranged by the Vigilance Dy.S.P. and as directed by the Vigilance Dy. S. P., he went to the Krishi Bhavan along with the Dy. S. P. and the police party. He further stated that as directed by the Dy.S.P. he along with PW2 went to the Krishi Bhavan and PW2 stood in front of the Krishi Bhavan and he went inside the office and met the appellant. Then the appellant asked him as to whether he had brought the money as demanded. He answered positive. Then the

appellant came to the varandha of the Krishi Bhavan. He followed the appellant and gave Rs.1,500/- to the appellant. The appellant received the amount and put it in the right side of his pocket. He gave a signal to the vigilance party. They rushed to the spot and the appellant was arrested red hand and the amount was recovered after conducting phenolphthalein test. PW2 who was the trap witness stated that a trap was arranged by PW9 and as directed by him he along with PW1 went to the Krishi Bhavan and he stood in front of the Krishi Bhavan and PW1 went inside the office. He also stated that PW1 was seen talking to the appellant and on getting signal from him, he along with the police party went to the office. PW9 introduced himself and PW2 and others to the appellant. He further stated that when the appellant was questioned, the appellant stated that he had kept the notes in his pocket. Then the notes were taken out from the right side pocket of the appellant and a phenolphthalein test was conducted. PW3 was the Senior Agricultural Assistant in the Krishi Bhavan. Exts.P4 and P6 were proved by him. PW5 is Chathunni. He stated that PW1 used to meet him everyday. He stated that when the appellant came to Kallingal, he told him that PW1 had gone to Alathur to encash the cheque. PW6 was the Agricultural Officer.

6. The evidence of PW6 and Exts.P10 and P11 would show that the third instalment was given on 25-5-1999 and receipt for the same was on 25-5-1999 itself. The cheque is also dated 25-5-1999. The stamp paper which was produced by the mother of PW1 is also dated 25-5-1999. It has come out in evidence the mother of PW1 put her thump impression on 25-5-1999. PW6 in his evidence stated as follows:- "ഉപഭോക്താവിന് മൂന്നാമത്തെ ഗഡു കൊടുക്കുന്നത് ആ കിണറിന്റെ പണി പരിപൂർണമായിട്ടു കഴിഞ്ഞ ശേഷമാണ്. ചിന്നക്ക് ചെക്കാണ് കൊടുത്തത്. ചെക്ക് എന്റെ personal custody യിൽ സൂഷിച്ചിരുന്ന രേഖയാണ്. ഉപഭോക്താവ് വന്നു കഴിഞ്ഞാൽ ഞാൻ അവരുടെ മുന്നിൽ വച്ചാണ് ചെക്കെഴുതുന്നത്. ആ ചെക്കിന്റെ പുറത്ത് ഉപഭോക്താവിന്റെ ഒപ്പോ വിരലടയാളമോ വയ്ക്കണം വിരലടയാളമോ ഒപ്പോ ഞാൻ attest ചെയ്ത് date വയ്ക്കണം. counterfoil ലും ഉപഭോക്താവിന്റെ ഒപ്പോ വിരലടയാളമോ വാങ്ങണം. അതു കഴിഞ്ഞ് ഉപഭോക്താവിൽ നിന്നും രസീത് ഒപ്പിട്ടു വാങ്ങും. ചെക്കു വാങ്ങുന്നതോടുകൂടി ഉപഭോക്താവിന്റെ acquittance വാങ്ങും. Ext.P11 (series) counter foil കണ്ടു അതു പ്രകാരം ചിന്നക്ക് ഒടുവിൽ 10000 രൂപയുടെ ചെക്കു കൊടുത്തത് 25-5-99 ലേണ്. ഒടുവിലത്തെ ചെക്കു കിട്ടിക്കഴിഞ്ഞാൽ പിന്നെ ഉപഭോക്താവിന് ക്രിഷിഭവനുമായി യാതൊരു ബന്ധവുമില്ല. ചെക്ക്, രസീത്, എല്ലാം 25-5-99 നു തന്നെയാണ്". In cross examination when a question was put to him

whether in between 5-5-1999 and 1-6-1999 Kannan came in the Krishi Office? He answered thus: "അതിനിടെ ഒരു ദിവസം വന്നു. വന്നപ്പോൾ ഞാൻ ചെക്കു മാറിക്കിട്ടിയില്ലേ എന്നു ചോദിച്ചു. കിട്ടി എന്നു കണ്ണൻ പറഞ്ഞു". It is relevant to note that there is only the evidence of PW1 that he went to the office of the appellant on 29-5-1999. In this context PW1 stated that on 29-5-1999 his mother was also accompanied him. But it has come out in evidence that his mother waited in the bus stand and she did not went to the office of the appellant on 29-5-1999. If that be so, the alleged demand made by the appellant for an amount of Rs.1,500/- is not corroborated by any evidence other than that of PW5. Further it can be seen that the original applicant mother of PW1 was not questioned or examined as a witness to the prosecution. It creates doubt regarding the presence of PW1 at the office of the appellant on 29-5-1999. When the evidence of PW5 is analyzed, it can be seen that PW5 had taken some loan from the agricultural office for purchasing a hand-cart for selling vegetables and the hand-cart was later alienated by PW5 and the appellant reported this matter to the Agricultural Officer. It is also to be noted that PW5 is the only witness to support the evidence of PW1 regarding the presence of PW1 at the office of the appellant on 29-5-1999. The evidence of PW5 would show that he is well

acquainted with PW1 and his mother and he helped them for getting financial assistance from the office of the Agricultural Department. Further the evidence of PW5 would show that on 31-5-1999 the appellant came to the place called Kallungal where PWs.1 and 5 were residing and when the appellant asked him whether he had seen PW1, he replied that PW1 went to Alathur for encash the cheque. PW1 admitted in his evidence that only on the advice given by PW5, he filed the complaint. Hence, the finding of the trial court that PW1 went to the office of the appellant on 29-5-1999 is not supported by any acceptable evidence apart from the evidence of PWs.1 and 5. The evidence of PW2, who accompanied PW1 on 1-6-1999, would not prove that there was any demand from the appellant even on 1-6-1999. In Ext.P1 PW1 had a definite case that "ചെക്കു മാറിവന്നശേഷം 1500 രൂപ അയാൾക്കും കൃഷി ഓഫിസർ സാജൻ മാത്യുവിനും വേണമെന്ന് പറഞ്ഞു". On the basis of the above statement, no investigation has been conducted. In the above circumstances, the finding of the trial court that the prosecution had succeeded in proving the demand, if any, made by the appellant for an amount of Rs.1,500/- is perverse and is liable to be set aside.

7. The next question to be considered is whether the finding of the trial court that as per the evidence given by PWs.1, 2 and 9 and Ext.P3

mahazar, the prosecution had succeeded in proving the fact that the appellant had received MO1 series currency notes on 1-6-1999 at about 11 a.m. at the office premises is correct or not. The trial court had not considered the case set up by the appellant in his 313 statement regarding the recovery of the marked currency notes. The specific case of the appellant was that on the date of the incident namely; on 1-6-1999, while he was talking with one Biju at the premise of the office, PW1 came behind and put the notes in his pocket. Immediately he caught hold of PW1 and, in the meanwhile, the vigilance party came and MO1 series notes were recovered from his pocket. PW2, trap witness, stated that as directed by the Dy.S.P. Vigilance he went along with PW1 to the office of the appellant and he stood infront of the Krishi Bhavan. He saw PW1 talking with the appellant. He also stated that when PW1 had given the currency notes to the appellant, the appellant received the same with his right hand and put the same to his pocket. In this context when MO4 bottle, which contained the sodium bicarbonate liquid, in which the right hand of the appellant dipped, was produced before the court, there was no colour change in the liquid and hence this Court is of the view that the investigating agency failed to prove that the preserved solution used for phenolphthalein test on the person of the accused. In this context, the learned counsel relies on a

Full Bench decision of the Gujarat High Court reported in Rameshchandra Tukaram Talakar V. State of Gujarat (AIR 1980 Guj. 1). In the above decision the Gujarat High Court held that it was necessary for the investigating agency to preserve the solution used for the experiment as regards detection of phenolphthalein powder on the person of the accused or on his clothes or anything that he had founded. In case of failure or omission of the investigating agency to preserve such solution, it was open to the Court to raise an inference adverse to the prosecution at the trial, depending upon the facts and circumstances of such case and to determine upon the impact of that inference on the other evidence before it. The court below relied on the evidence of PW2 as a corroborative evidence of PW1 to find the appellant received the amount. In the case in hand the appellant was arrested by PW9 and a phenolphthalein test was conducted on the hands of the appellant. If the evidence adduced by PW1 and PW2 is correct, no doubt the solution contained in MO4 ought to have been changed its colour. It would create a doubt regarding the receipt of the amount as stated by PW1. In this context, one more aspect also to be analyzed. PW1 had a case that PW5 went to the office of the Dy.S.P. on 31-5-1999 and had arranged a trap and subsequently he was asked by him to go to the office of PW9 and file the complaint. But PW5 has no case like

that and he even denied that he went to the office of PW9. According to PW9, he received information of the complaint of PW1 only on 1-6-1999 whereas PW2 admitted that himself and CW3 were directed by the Superintending Engineer on 31-5-1999 to go to the office of PW9 at the morning. All these facts create doubt regarding the entire prosecution case and even the alleged recovery of MO1 series of notes as spoken to by PWs.2 and 9. Even if the amount has been recovered as per the evidence of PWs.1 and 9 was not sufficient to convict the appellant when the substantive evidence in the case was not reliable. In this context, the learned counsel has brought to the notice of this Court a decision reported in Sooraj Mal V. State (Delhi Administration) (1979) 4 SCC 725). In the above decision the Supreme Court held that mere recovery of money divorced from the circumstances under which it was paid was not sufficient to convict the appellant when the substantive evidence in the case was not reliable. The learned counsel also placed yet another decision of the Apex Court reported in in M.K. Harshan V. State of Kerala 1997 SCC (Cri) 283 to contend that the evidence of PW1 must be corroborated with other independent witness regarding the demand for bribe made by the appellant. In the above decision the Apex Court considered the necessity for corroboration and held as follows:-

> "**..In the light of these conflicting versions and suspicious features on this crucial aspect, the plea of the accused that the notes were put in the drawer without his knowledge, does not appear to be improbable. In any event, PW1's evidence for the above said reasons, does not appear to be wholly reliable. It is in this context, the courts have cautioned that as a rule of prudence, some corroboration is necessary".**

If that be so, it is the duty of the prosecution to adduce evidence in support of the evidence of PW1. In the above circumstances, **t**he charge against the appellant is not supported by any acceptable evidence. Hence, this Court is of the view that the prosecution has not succeeded in proving the case against the appellant beyond doubt .

8. In the light of the discussions made in this judgment, this Court is of the view that the findings entered by the trial court are not sustainable and the prosecution has failed to prove the charge against the appellant. Hence, benefit of doubt has been given to the appellant. Accordingly, the judgment of the trial court is set aside and the appellant is acquitted. Bail bond executed by the appellant shall stand cancelled. If the appellant has made any deposit towards the fine, it shall be refunded to him as per law.

The appeal is allowed as above.

K. Thankappan,
Judge.

mn.

K. Thankappan, J.

- - - - - - - - - - - - - - - -

Crl.A.No. 1032/2004 B

- - - - - - - - - - - - - - - -

Judgment

31-10-2007